

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1428

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KIRBY J. HENSLEY,

*Petitioner,*

v.

MUNICIPAL COURT, SAN JOSE-MILPITAS  
JUDICIAL DISTRICT, SANTA CLARA COUNTY,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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**Docket Entries**

**UNITED STATES DISTRICT COURT**

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**C-70    1276    OJC RFP**

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**KIRBY J. HENSLEY,**

**vs.**

**MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT  
SANTA CLARA COUNTY, PEOPLE OF THE STATE OF CALIFORNIA.**

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***For Plaintiff:***

**PETER R. STROMER**

**515 North First Street, Suite 201  
San Jose, California 95112**

***For Defendant:***

**LOUIS P. BERGNA, District Attorney  
190 W. Hedding Street  
San Jose, California 95110**

***Basis of Action:***

**Petition for Writ of Habeas Corpus**

**DATE**

**PROCEEDINGS**

**1970**

- 6-16    1. Filed Petition for Writ of Habeas Corpus**  
**12    2. Filed Appli. by Petnr. for Stay of Execution  
in Connection with Petn. for Hab. Corp.**

*Docket Entries*

DATE

PROCEEDINGS

1970

- 12    3. Filed O.S.C. returnable June 26, 1970 at 10 A.M. in San Jose; Resp. to File A Return by June 22, 1970; Petnr. May File a Traverse Prior to June 26, 1970.
- 18    4. Filed motion by petnr. to Transfer to San Jose and Assigned to Judge Peckham & to Con. Hrg. to July 24 ,1970, 10 A.M.
- 23    5. Filed Order Cont. to San Jose, Calif. for Hrg. before Judge Peckham on July 24, 1970, 10 A.M.
- 25    6. Filed Reassignment Order of Case to Judge Peckham
- 7- 6    7. Filed Petnr's Memo of Pts. & Auths.
- 24    8. Filed Resps Ret to OSC, Pts & Auths in Oppos. to Petn for Writ of HC.
- 24    ORD aft hrg. Mo for Convening THREE JUDGE COURT not Given; Appli for OSC Submitted
- 29    9. Filed Petnr's Traverse & Affidavit of Trial Counsel, Robert C. Bienvenu
- 31    10. Filed Order Denying Petn. for Writ of Hab. Corp. Copies mailed.
- 8- 4    11. Filed petnr's memo of pts & auths.
- 4    12. Filed Order granting Certificate of probable cause to appeal
- 5    (Copies mailed to Parties of Record)

*Docket Entries*

DATE	PROCEEDINGS
6	13. Filed defts proof of svc of memo of pts & auths.
7	14. Filed notice of Appeal by Pltff under provision FRAP Rules 24 & 22-B
10	1. Mailed Clerk's notice of filing appeal
7	15. Filed \$250.00 Cost Bond on Appeal by Pltff
13	16. Filed designated for record on appeal by Pltff & No Reporter's Transcript will be required
9-16	Made, Hand Carried Record on Appeal CCA

**UNITED STATES DISTRICT COURT****NORTHERN DISTRICT OF CALIFORNIA****SAN FRANCISCO, CALIFORNIA 94102****Name Peter R. Stromer****Number 295-4430****Address 515 North First Street*****Attorney for Petitioner***

**Petition for Writ of Habeas Corpus  
Persons in State Custody**

**No. C-70 1276 OJC**

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**KIRBY J. HENSELEY,**

**VS.**

**MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT  
SANTA CLARA COUNTY, PEOPLE OF THE STATE OF CALIFORNIA.**

---

**[File Endorsement and Instructions Omitted]**

- 1. Place of detention: released under own recognizance.**
- 2. Name and location of court which imposed sentence:  
Municipal Court for the San-Jose Milpitas Judicial  
District, 200 West Hedding, San Jose, California.**
- 3. The indictment number upon which and the offense  
for which sentence was imposed: No. 10511-C. Vio-  
lation of California Education Code § 29007.**
- 4. The date upon which sentence was imposed and the  
terms of the sentence: July 1, 1969 sentenced to one  
year in jail and fined \$625.00.**
- 5. A finding of guilty was made after a plea of not  
guilty.**
- 6. That finding was made by a judge without a jury.**
- 7. Did you appeal from the judgment of conviction or  
the imposition of sentence? Yes.**



*Petition for writ of Habeas Corpus  
Persons in state Custody*

8. If you answered "yes" to (7), list
- (a) The name of each court to which you appealed: Appellate Department, Superior Court of the State of California in and for the County of Santa Clara (Appeal plus petition for rehearing and/or certification).
  - (b) The result in each such court to which you appealed: Affirmed conviction.
  - (c) The date of each such result: February 2, 1970. Petition for rehearing and/or certification to District Court of Appeal denied March 5, 1970.
  - (d) If known, citations of any written opinion or orders entered pursuant to such results: Opinion #222 In the Superior Court of the State of California in and for the County of Santa Clara, Appellate Department.
9. [Not applicable].
10. State concisely the grounds on which you base your allegations that you are being held in custody unlawfully:
- (a) Violation of U.S. Constitution, 1st Amendment.
  - (b) Violation of U.S. Constitution, 14th Amendment.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) The conviction herein is illegal and violative of petitioner's free exercise of religious belief guaranteed by the U.S. Constitution, Amendment I. Petitioner is the chief presiding officer and direc-

*Petition for writ of Habeas Corpus  
Persons in state Custody*

tor of a bona fide church and religious denomination. He has been convicted for exercising his religious beliefs whereby, in furtherance of its exclusively religious activities, his Church has awarded honorary Doctor of Divinity certificates to individuals who complete a course of instruction in the Church's principles.

The United States Supreme Court as long ago as 1872 decreed that controversies over church doctrine and practice were beyond the scope and jurisdiction of civil authorities.

"In this country the full and free rights to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 13 Wall. 679, at 728-729 (1872), quoted with approval in *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969).

- (b) Failure of trial counsel to appear and present any defense of fact or law that was available to petitioner when the Trial Court re-opened the case prevented petitioner from obtaining evidence necessary to his defense. It is respectfully submitted that such inadvertence by counsel effectively denied petitioner a trial on the merits and constitutes a denial of due process *contra* petitioner's



*Petition for writ of Habeas Corpus  
Persons in state Custody*

Constitutional rights under the 14th Amendment  
to the U.S. Constitution.

12. Prior to this petition have you filed with respect to this conviction.
- (a) Any petition in a State court for relief from this conviction? Yes.
  - (b) Any petitions in State courts for habeas corpus? Yes.
  - (c) Any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
  - (d) Any other petitions, motions or applications in this or any other court? No.
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof: Petition for rehearing and/or certification to California District Court of Appeals.
  - (b) the name and location of the court in which each was filed: Superior Court Appellate Department, 190 North Market Street, San Jose, California.
  - (c) the disposition thereof: Petition denied without opinion. State Habeas Corpus petitions denied without opinion by District Court of Appeal & California Supreme Court.
  - (d) the date of each such disposition: March 5, 1970 —Petition for rehearing denied. March 20, 1970— Habeas Corpus denied by Court of Appeal.

*Petition for writ of Habeas Corpus  
Persons in state Custody*

June 10, 1970—Habeas Corpus denied by Supreme Court.

- (e) if know, citations of any written opinions or orders entered pursuant to each such disposition: NONE.
- 14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application, which you have filed? Yes.
- 15. If you answer "yes" to (14), identify.
  - (a) which grounds have been previously presented: ALL.
  - (b) The proceeding in which each ground was raised: In petition for rehearing and in State Habeas Corpus petitions.
- 16. [Not applicable]
- 17. Were you represented by an attorney at any time during the course of—
  - (a) your arraignment and plea? Yes.
  - (b) your trial, if any? Yes.
  - (c) your sentencing? Yes.
  - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.
  - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes.

*Petition for writ of Habeas Corpus  
Persons in state Custody*

18. If you answered "yes" to one or more parts of (17), list—

(a) the name and address of each attorney who represented you:

I. Robert C. Bienvenu, Modesto, California.

II. Richard T. Tosaw, 928 12th St.,  
Modesto, Cal.

III. Peter R. Stromer, 515 North First Street,  
Suite 201, San Jose, California 95112

(b) the proceedings at which each such attorney represented you:

I. Trial.

II. Appeal.

III. Petition for rehearing & State Habeas Corpus Petitions.

19. [Not applicable]

STATE OF CALIFORNIA,

COUNTY OF SANTA CLARA, ss.:

PETER R. STROMER, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Peter R. Stromer  
Signature of Affiant  
Attorney for Petitioner

[Jurat Omitted]

**Return to Order to Show Cause and Points and  
Authorities in Opposition to Petition for  
Writ of Habeas Corpus**

[File Endorsement and Caption Omitted]

Comes now LOUIS P. BERGNA, District Attorney of Santa Clara County and his deputy, DENNIS ALAN LEMPERT for the People of the State of California and for a return to the Order to Show Cause heretofore issued in the above-entitled matter on June 12, 1970.

**I.**

On February 14, 1969, a complaint was filed in the Municipal Court for the San Jose-Milpitas Judicial District, accusing the defendant, KIRBY J. HENSLEY, Petitioner, of a misdemeanor, to wit, a violation of California Education Code Section 29007.

**II.**

Trial was had in the aforementioned court before his Honor, Judge EDWARD J. NELSON, on May 19, 1969.

At the time of trial, the defendant and his attorney then being present, witnesses were called by the People and evidence was submitted.

At the close of the People's case, after the People had rested, the defendant moved for a dismissal. Extensive argument was had regarding the court's jurisdiction in the case, and the judge ruled that the court lacked jurisdiction to hear the case and stayed further proceedings.

The following day, the People filed a Notice of Motion to re-open the case for further argument regarding jurisdiction. The defendant filed a Notice in Opposition to that motion.

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On May 27, 1969, the court set aside the stay and placed the matter back on calendar for June 11 to consider the People's motion. The defendant was not present at that time although he had been notified and was aware of the proceeding.

On June 11, the defendant again absented himself from the proceedings when the court determined that it did in fact have jurisdiction pursuant to Penal Code Section 781.

III.

On June 25, the time the court had set for further trial in this matter, the defendant not being present, the judge found the defendant guilty and set the date of sentencing for June 27, 1969.

IV.

On June 27, 1969, the court continued sentencing until July 1, 1969, at the request of the defendant.

The defendant, with his counsel, appeared on July 1, 1969, and sentence was imposed by the court.

Execution of this sentence was stayed at the request of the defendant pending his appeal.

V.

Notice of Appeal to the Appellate Division of the Superior Court was filed by the defendant on July 3, 1969.

On February 2, 1970, the Appellate Division of the Superior Court of Santa Clara County filed a written opinion, No. 222, which affirmed in all respects, the Petitioner's conviction. Petition for re-hearing and or certification to the District Court of Appeal was denied by the Appellate Division on March 5, 1970.

*Return to Order to Show Cause and Points and  
Authorities in Opposition to Petition for  
Writ of Habeas Corpus*

## VI.

The Court of Appeals of the State of California in 1 Crim. 1687 denied the Habeas Corpus Petition of the Petitioner on March 20, 1970.

The California Supreme Court in Crim. 14608 similarly denied Petitioner's Habeas Corpus Petition on June 10, 1970.

## VII.

Each of the courts above mentioned were presented with basically the same allegations by the Petitioner and each of the Courts found that there had been no violation of either state or federal constitutional rights. In fact, there has not been a violation of any constitutional rights possessed by this Petitioner and the judgment is valid in all respects.

## VIII.

This Petitioner is not presently in custody. He is at liberty on his own recognizance pending the outcome of this habeas corpus proceeding. Therefore, this court is not in a position, at this time, to hear, consider, or grant a Writ of Habeas Corpus.

## POINTS AND AUTHORITIES

Title 28, U.S.C. Section 2241(c)(3), provides as follows:

"(c) The Writ of habeas corpus shall not extend to a prisoner unless—

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States".



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Writ of Habeas Corpus*

In the many cases that have construed the above section with particular emphasis on the word "custody" there has been uniformity in holding that unless the individual is in physical custody, the Writ of Habeas Corpus is not available to him. Additionally, where an individual has been released either on bail or on his own recognizance, the status of that individual is not one of "in custody" to come within the purview of the Federal Habeas Corpus. *Moss v. State of Maryland*, 272 F. Supp. 371 (1967).

Historically, the Great Writ or Writ of Habeas Corpus is available to free an individual who is illegally incarcerated. However, as stated in *Brown v. Johnston*, 306 U.S. 19, 26 (1939), there is no higher duty than to maintain [the Writ of Habeas Corpus] unimpaired. Here, where the Petitioner's liberty has not been infringed upon, this great constitutional relief, should not be invoked unnecessarily lest it be vitiated by its over broad use.

### IX.

The Petitioner intentionally and deliberately bypassed an available state remedy. Therefore, Respondent feels in view of the fundamental nature of the defect, the petition should be summarily denied.

### POINTS AND AUTHORITIES

Section 1043 of the California Penal Code provides in part that if a defendant in a misdemeanor action absents himself with full knowledge that a trial is to be or is being had, the trial may proceed in his absence. In so absenting himself from the trial and having the full knowledge of its occurrence, the defendant knowingly relinquishes

*Return to Order to Show Cause and Points and  
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Writ of Habeas Corpus*

his right to defendant himself and to present such evidence as might lead to an acquittal.

In the case of *Nelson v. People of the State of California*, 346 F.2d 73 (1965), decided by the Ninth Circuit Court of Appeals, the court stated, "If a habeas applicant, after consultation with competent counsel or otherwise, understandably and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts whether, for strategic, tactical, or any other reason that can fairly be described as a deliberate bypass of state procedures, than it is open to the federal court on habeas to deny him all relief if the state courts refuse to entertain his federal claims on the merits—though of course, only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing on the applicant's defaults." The courts went on to say, "If either reason motivated the action of Petitioner's counsel, and their plans backfired, counsel's *deliberate choice* (emphasis added) of the strategy would amount to a waiver binding on Petitioner and would proclude him from a decision on the merits of his federal claim either in the state court or here."

Traveling slightly further back in time, we find in the case of *Fay v. Noia*, 372 U.S. 391, "We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who had deliberately bypassed the orderly procedure of the state courts and so doing has forfeited his state court remedies."

"But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in *Johnson v. Zerbst*, 304

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U.S. 458, 464, 'An intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard." The attached affidavit by the undersigned clearly demonstrates that the decision made by Petitioner's counsel was a deliberate decision to remain absent from the proceedings, and by pass the right to defend oneself.

Here, it is clear that the benefit of the Writ of Habeas Corpus should not be available to the Petitioner who, but for his conscious choice, would have had other remedies available to him.

X.

With regard to the allegations contained in the petition regarding the status of the Petitioner, the so-called religious organization which he heads, and the nature and effect of the "Honorary Doctor of Divinity" Degree issued, the record before this court is barren of any scintilla of proof to substantiate the claimed 'facts' as set forth.

The Petitioner failed to present these "facts" in the appropriate judicial tribunal to wit, Judge Nelson's court and should not now be permitted to bring before the court without benefit of cross examination or otherwise items which were not heretofore sought to be proved.

CONCLUSION

The state courts refused to entertain the Petitioner's assertions of the deprivation of his constitutional rights in view of his intentional and deliberate absence from the trial.

*Return to Order to Show Cause and Points and  
Authorities in Opposition to Petition for  
Writ of Habeas Corpus*

WHEREFORE, we respectfully submit that the Order to Show Cause be discharged, habeas corpus be denied and the proceedings be dismissed.

DATED: July 24, 1970, in San Jose, California

LOUIS P. BERGNA, *District Attorney*  
Santa Clara County  
By /s/ DENNIS ALAN LEMPert  
Dennis Alan Lempert  
*Deputy District Attorney*  
*Attorneys for the People*

**Affidavit of Dennis Alan Lempert****[Caption Omitted]**

I, **DENNIS ALAN LEMPert**, Deputy District Attorney, 190 West Hedding Street, San Jose, California declare:

That I was the Deputy District Attorney responsible for the trial of **KIRBY J. HENSLEY**.

That after proceedings were stayed on May 19, 1969, I personally contacted the defendant's attorney, Robert C. Bienvenu in Modesto. I advised Mr. Bienvenu of the proceedings pending in Judge Nelson's court and was advised by Mr. Bienvenu that under no circumstances would he or his client, **KIRBY J. HENSLEY**, return to this jurisdiction for any further proceedings.

I declare on information and belief and under penalty of perjury that the foregoing is true and correct.

**DATED: July 24, 1970, at San Jose, California.**

/s/ **DENNIS ALAN LEMPert**  
Deputy District Attorney  
Dennis Alan Lempert

**Affidavit of Dennis A. Lempert****[Caption Omitted]**

I, DENNIS ALAN LEMPert, Deputy District Attorney, 190 West Hedding Street, San Jose, California declare:

That between the period of June 14, 1970 through July 10, 1970, I was attending National District Attorney's College at Houston, Texas.

That upon my return to the office, I was unaware until July 15, 1970 of the pendency of the Petition for Writ of Habeas Corpus.

That I have attempted to the greatest extent possible to complete the Return to Order To Show Cause. However, I was unable to complete said document until 9:00 a.m. this date.

That on Wednesday, July 22, 1970, I contacted attorney for the petitioner and advised him of my circumstances and requested a stipulated continuance. Mr. Stromer declined to agree to a continuance and I at that time indicated to him the general nature of the legal basis in the Return to Order To Show Cause.

That I therefore respectfully request the Court in its discretion to permit the filing of the Return to Order To Show Cause at this time in view of the unusual circumstances causing its delay.

I declare on information and belief and under penalty of perjury that the foregoing is true and correct.

Dated: July 24, 1970, at San Jose, California.

/s/ DENNIS ALAN LEMPert  
Dennis Alan Lempert  
Deputy District Attorney



**Traverse by Petitioner and Affidavit of Trial Counsel,  
Robert C. Bienvenu**

**[File Endorsement and Caption Omitted]**

Petitioner for his traverse of the return to the writ of habeas corpus, alleges:

**I.**

Answering the allegations of paragraphs I and II thereof petitioner admits all the material allegations thereof except that allegation wherein it is stated that defendant had been notified and was aware of the proceedings either on May 27, 1969 or June 11, 1969, which allegation is expressly denied.

**II.**

Answering the allegations of paragraphs III, IV, V and VI thereof, petitioner admits the allegations therein.

**III.**

Answering the allegations of paragraph VII thereof, petitioner admits the allegations therein, except that petitioner denies that there has not been a violation of his constitutional rights and further denies that judgment is valid in all respects.

**IV.**

Answering the allegations of paragraph VIII thereof, petitioner admits that he is released on his own recognition per a Stay of Execution granted by the Honorable Edward J. Nelson, Judge, Municipal Court, San Jose-Milpitas Judicial District pending the outcome of this habeas corpus proceeding. Except as herein admitted, peti-

*Traverse by Petition and Affidavit of Trial Counsel,  
Robert C. Bienvenu*

tioner denies that he is not presently in custody, being in constructive custody of the trial court, respondent herein, and further denies that this court is not in a position, at this time, to hear, consider, or grant a Writ of Habeas Corpus.

V.

Petitioner reiterates all of the facts stated in the petition and pleadings filed herein on his behalf as reasons why such detention is without warrant of law.

WHEREFORE, KIRBY J. HEWLEY, the petitioner herein prays that the said Writ of Habeas Corpus be sustained and that he be delivered from the custody and restraint of said respondent as prayed for in the petition for said Writ and for his discharge from the custody, restraint and detention of his liberty as hereinabove set forth and for such other, further and different relief as to the Court may seem just and proper.

/s/ PETER R. STROMER

Peter R. Stromer

Attorney for Petitioner

I, the undersigned, say:

I am the attorney for the Petitioner in this action; Petitioner is absent from the County of Santa Clara, California, where I have my office, and I make this verification for and on behalf of that party for that reason; I have read the above document and know its contents; I am

*Traverse by Petition and Affidavit of Trial Counsel,  
Robert C. Bienvenu*

informed and believe and, on that ground, allege that the matters stated in it are true.

Executed on July 27, 1970, at San Jose, California.

I declare under penalty of perjury that the above is true and correct.

/s/ PETER R. STROMER  
Peter R. Stromer

## **Declaration of Robert C. Bienvenu**

**ROBERT C. BIENVENU** says:

That I am an attorney at law, duly licensed to practice in the State of California. That I was the attorney of record for defendant, Kirby J. Hensley, at the trial held in the Municipal Court for the San Jose-Milpitas Judicial District on May 19, 1969.

That upon the completion of the prosecution's case, a motion for acquittal was made pursuant to Section 1118 of the Penal Code of the State of California. That, after argument by both sides, the Court ended the trial, bail was exonerated and defendant and all his witnesses left the courtroom without presenting a defense.

Subsequently, a telephone call was received from Deputy District Attorney Lempart stating that he was making a motion to reopen the case.

No authority was cited to declarant permitting the re-opening of a criminal proceedings upon the completion of the prosecution's case after jeopardy had attached. Declarant indicated that he would not and, in fact, did not, appear at the time of the motion but filed a written Memorandum in Opposition to the Notice of Motion.

The Court granted the motion, found defendant guilty and pronounced sentence on July 1, 1969. A Notice of Appeal was filed on July 2, 1969. On July 5, 1969, declarant's wife passed away and a substitution of attorneys was made and since that time, declarant has not been associated with the case.

Declarant at no time deliberately bypassed any established state procedures in the case. Though declarant did not appear personally at the time of the hearing on the motion to reopen, a complete memorandum in opposition

*Declaration of Robert C. Bienvenu*

thereto was timely filed. The memorandum before the Court contained everything declarant would have said in oral argument. Nothing further could have been added, and to travel to San Jose from Modesto to reiterate the contents would have taken a full day from declarant's practice and wasted the Court's time. It is a common practice to submit motions for the Court's decision based upon a written memorandum when the attorneys involved practice in another city a long distance from the courthouse where the matter is to be heard.

The defendant was convicted in absentia on the misdemeanor charge but this too is in accord with established state procedure.

A timely motion of appeal was filed in the case and handled by another attorney. Therefore, from the beginning of the case to the present time, every act performed by declarant was in complete accord with established state procedures.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on July 27, 1970, at Modesto, California.

/s/ ROBERT C. BIENVENU  
Robert C. Bienvenu

## Points and Authorities

[Caption Omitted]

## I

The Nelson case, *Nelson v. People of the State of California*, 346 F.2d 73 is clearly distinguishable from the case at bar. In *Nelson*, the District Court, in its dismissal of Nelson's habeas corpus proceeding, never did reach the merits of Nelson's contention as to his constitutional rights for as the Court pointed out that Nelson's claim to suppress evidence illegally obtained must first be raised at trial by appropriate objection and not raised for the first time on appeal. (emphasis supplied) (citations) Petitioner herein has not had a trial on the merits to this date. Absent such a trial, petitioner has not yet had an opportunity to present any defense to the charges made leading to this conviction.

Further, the District Court, in *Nelson*, concluded that Nelson had been competently represented by his counsel, that Nelson at no time contended that in handling the matter as he did, his counsel was acting contrary to Nelson's wishes.

Petitioner herein emphatically denies that his trial counsel advised him that the trial was to be reopened in San Jose and failure of petitioner to appear would lead to his conviction. As stated in the pleadings on file herein, petitioner was advised *contra*, that the trial in San Jose was dismissed and that petitioner need not appear further. There was no deliberate by-passing of state procedure. As the Ninth Circuit Court of Appeals makes clear in *Nelson, supra*, there must be "strategic, tactical, or any other reasons than can fairly be described as the deliberate by-passing of state procedure, . . ." *Id.*, at 79. "At all



### Points and Authorities

events we wish it clearly understood that the standard here put forth depends on the *considered choice of the petitioner*. A choice made by counsel not participated in by the petitioner does not automatically bar relief." *Id.*, (emphasis supplied.)

### II

Just as the facts herein show no deliberate by-pass of state procedures there is no evidence to show a waiver of a federally guaranteed constitutional right. The rules that govern the determination of whether a constitutional right has been waived are summarized in *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966):

"The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law."

There is a presumption against the waiver of constitutional rights, see, e.g., *Glasser v. United States*, 315 U.S. 60, 70-71, and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 485, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461.

### III

In *Kuhl v. United States*, (9th Cir.) 370 F.2d 20 (1966), a 5-4 decision, the majority opinion denied a motion to vacate judgment on grounds of deliberate by-passing of state criminal procedures by stating:

"It is urged in the dissent that we should order a hearing on these questions. We think that to do so here, in a case in which a defendant had a fair trial and

### Points and Authorities

was represented by competent counsel, would be to reach out to find support for a collateral attack on his conviction . . ." *Id.*, at 23. (emphasis supplied)

Herein, the facts are clearly distinguishable. There has been no fair trial, if any trial at all, due to inadvertence of trial counsel.

#### IV

Pursuant to 28 U.S.C. §2254(d)(6) petitioner has not had a full, fair, and adequate hearing in the state court proceeding. Not only were material facts not adequately developed in the state hearing, no facts were developed in petitioner's defense. There is thus sufficient evidence to support a finding that petitioner was denied effective assistance of counsel. If counsel are sufficiently deficient in their performance, defendant may claim that his constitutional right to effective representation has been lost; further even the fact that defendant has had a fair trial of that issue in the state court and lost does not mean that he cannot raise it again in federal court, since it is a federal right. 28 U.S.C.A. §§2254, 2254(d)(3, 6) *Leventhal v. Gavin*, 421 F.2d 270 (1970).

#### V

The U.S. Supreme Court's decision in *Townsend v. Sain*, 1963, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770, requires that a federal court grant an evidentiary hearing to a habeas corpus applicant if . . . the state factual determination is not fairly supported by the record as a whole. *Id.*, at 313, 83 S.Ct. at 757.

#### VI

In order to sustain a claim of ineffective counsel there must be an affirmative factual basis demonstrating coun-

*Points and Authorities*

sel's inadequacy of representation. In *re Parker*, 423 F.2d 1021 (1970). It is respectfully submitted that the record herein conclusively shows that trial counsel's failure to appear when advised by the District Attorney that the case was being re-opened constitutes a sufficient factual basis demonstrating counsel's inadequacy of representation.

## VII

By the express terms of §2254(d) the presumption of correctness of state court findings does not arise if the applicant establishes, among other things, that the state court hearing was not "*full, fair, and adequate*" or that "*the material facts were not adequately developed in the State Court hearing*" *Selz v. State of California*, (9th Cir.) 423 F.2d 702 (1970).

Clearly, the factual record herein is devoid of any showing that a fair trial was had on the merits. What the State is contending is that petitioner herein must be allowed to serve a year in jail because his trial counsel's inadvertence or incompetence in failing to appear and in failing to advise his client, petitioner herein, that such failure to appear by trial counsel and defendant therein would result in his conviction, must be construed as a "deliberate by-passing" of state remedies. It is respectfully submitted that such a contention must shock the conscience of this court. A review of the cases wherein the "deliberate by-passing" doctrine has been formulated, (*Nelson, Kuhl, Selz, supra*) shows that in every case the court made an independent finding that there was adequate representation by competent counsel before the "deliberate by-pass" rule was applied. As the U.S. Supreme Court stated in *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, "(A)p-

**Points and Authorities**

plication of the "deliberate by-pass" doctrine requires the resolution of factual issues." *Id.*

Dated: July 27, 1970

/s/ PETER R. STROMER  
Peter R. Stromer  
Attorney for Petitioner

**Order**

[File Endorsement and Caption Omitted]

Petitioner, convicted of a misdemeanor in the state court and presently out on O.R. (own recognizance), brings an action in habeas corpus challenging the constitutionality of the state conviction.

The petition must be denied, because this court does not have jurisdiction over the matter. 28 U.S.C. § 2241(c)(3) provides that the writ of habeas corpus shall not extend to a prisoner unless he is "in custody" in violation of the laws of the United States.

The law of this circuit is clear that one who is out on bail is not "in custody" for either habeas corpus or 28 U.S.C. § 2255 purposes. *Matysek v. U.S.*, 339 F.2d 389, 392-93 (9th Cir. 1964). A fortiori, a person out on O.R. would not be in custody either.

The petition for habeas corpus is denied.

IT IS SO ORDERED.

Dated: 7/31/70

/s/ ROBERT F. PECKHAM  
United States District Judge

**Order**

[File Endorsement and Caption Omitted]

Petitioner's motion for reconsideration of his habeas corpus petition is denied.

However, petitioner is granted a certificate of probable cause so that he may test this court's reliance on *Matysek v. United States*, 339 F.2d 389, 392-93 (9th Cir. 1964) in the Court of Appeals for the Ninth Circuit.

Certificate of probable cause granted.

It Is So ORDERED.

August 4, 1970.

/s/ ROBERT F. PECKHAM  
United States District Judge



**Notice of Appeal**

**[File Endorsement and Caption Omitted]**

Notice is hereby given that **KIRBY J. HENSLEY**, petitioner above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the order and judgment rendered, made and entered herein on July 31, 1970, denying the petition for a writ of habeas corpus herein on the ground that this Court lacked jurisdiction over the matter.

**DATED: August 5, 1970**

**/s/ PETER B. STROMER**  
**Attorney for Petitioner**

**Opinion of United States Court of Appeals  
For the Ninth Circuit**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**No. 26274**

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**KIRBY H. HENSLEY,**

*Appellant,*

**VS.**

**MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT  
SANTA CLARA COUNTY, STATE OF CALIFORNIA,**

*Appellee.*

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**[January 19, 1972]**

**Appeal from the United States District Court  
for the Northern District of California**

**Before :**

**KOELSCH and CARTER, Circuit Judges, and  
SMITH,\* District Judge.**

**PER CURIAM :**

The sole question on appeal is whether or not a person released on his own recognizance following trial, convicted

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\* Honorable Russell E. Smith, United States District Judge, Missoula, Montana, sitting by designation.

*Opinion of United States Court of Appeals  
For the Ninth Circuit*

tion and sentence on a state criminal charge is within the purview of 28 U.S.C. §2241, which extends the remedy of habeas corpus to persons "in custody" in violation of the federal constitution.<sup>1</sup> We conclude that he is not.<sup>2</sup>

Not long ago, this court squarely ruled on this question in *Matysek v. United States*, 339 F.2d 389 (1964), cert. denied 381 U.S. 917. We held that a person released on bail was not "in custody," actual or constructive, so as to satisfy 28 U.S.C. §2241.<sup>3</sup>

Appellant Hensley urges that *Matysek* has been implicitly overruled by the recent Supreme Court cases of *Walker v. Wainwright*, 390 U.S. 335 (1968); *Peyton v. Rowe*, 391 U.S. 54 (1968) and *Carafas v. LaVallee*, 391 U.S. 234 (1968). These cases are distinguishable because in each of them there existed actual or constructive custody. In *Walker* and *Rowe*, the petitioners were in actual custody and in *Carafas*, the petitioner was on parole. In *Matysek*, this court, while recognizing that release on parole constituted constructive custody, distinguished a

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<sup>1</sup> Hensley has been at liberty on recognizance at all times since conviction. Initially the state court stayed execution of sentence. At the exhaustion of Hensley's state remedies the district court issued a stay of execution pending habeas proceedings therein. Both the district court and this court denied a stay of execution pending this appeal. Subsequently, the Circuit Justice granted the stay.

<sup>2</sup> We are unable to treat this petition as one seeking coram nobis relief because Hensley seeks to challenge a state court proceeding in federal court. Coram nobis lies only to challenge errors occurring in the same court. 7 Moore's Federal Practice 60.14, p. ¶46.

<sup>3</sup> The decisional rule is different in several other circuits. *Capler v. Greenville*, 422 F.2d 299 (5th Cir. 1970); *Burris v. Ryan*, 397 F.2d 553 (7th Cir. 1968); *Ouletta v. Sarver*, 428 F.2d 804 (8th Cir. 1970).

**Opinion of United States Court of Appeals  
For the Ninth Circuit**

bail situation holding that the attendant restrictions did not constitute custody. The Supreme Court has not, to this date, considered the express question posed herein.

We feel, therefore, constrained to follow *Matysek v. United States, supra*.

**Affirmed.**

**Order Denying Petition for Rehearing and  
Rejecting Suggestion for Rehearing *In Banc***

[File Endorsement and Caption Omitted]

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. B. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

Feb. 18, 1972

M. OLIVER KOELSCH  
United States Circuit Judge

**Order Granting Petition for Writ of Certiorari  
SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1972**

**No. 71-1428**

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**KIRBY H. HENSLEY,**

*Petitioner,*

**v.**

**MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT,  
SANTA CLARA COUNTY,**

*Respondent.*

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**The petition for a writ of certiorari is granted.**

**October 10, 1972**



